Filed 1/8/19 P. v. Lee CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES FRANCIS LEE,

Defendant and Appellant.

H041830
(Santa Clara County
Super. Ct. No. C1081813)

ORDER MODIFYING OPINION

NO CHANGE IN THE JUDGMENT

THE COURT:

It is ordered that the opinion filed herein on December 11, 2018, be modified as follows. On page 31, the following text shall be appended to footnote 8:

Lee further contends destruction of the original court records violated his due process rights because the records could have been exculpatory. (See *California v. Trombetta* (1984) 467 U.S. 479, 489 [state has duty to preserve evidence that might play a significant role in the suspect's defense].) But due process is not violated when, as is the case here, "the chances are extremely low" that the destroyed evidence would have been exculpatory. (*Ibid.*)

There is no change in the judgment.

Dated:_____

_____
Greenwood, P.J.

_____
Elia, J.

_____
Mihara, J.

Filed 12/11/18 P. v. Lee CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JAMES FRANCIS LEE, Defendant and Appellant.	H041830 (Santa Clara County Super. Ct. No. C1081813)

Defendant James Francis Lee was driving his pickup truck south on Highway 101 when he rear-ended the pickup truck of a family that had parked on the shoulder. Four-year-old Jose Diaz was killed, and the family's father suffered serious injuries. Lee's blood alcohol level tested at 0.175 percent and 0.16 percent. He had suffered two prior drunk driving convictions in 1988 and 1994.

A jury found Lee guilty of second degree murder, gross vehicular manslaughter, driving under the influence of alcohol and causing injury, and driving with a blood alcohol level of 0.08 percent and causing injury. The jury found various enhancements true, including allegations that Lee had suffered two prior drunk driving convictions within seven years of each other. The trial court imposed a total term of 15 years to life consecutive to four years four months in state prison.

Lee raises numerous claims on appeal. He challenges the sufficiency of the evidence for the murder conviction, the gross manslaughter conviction, and the finding on the prior convictions enhancement. He further contends that the trial court erred by failing to instruct the jury on unconsciousness and voluntary intoxication as defenses or partial defenses to the murder and gross manslaughter charges; that a statement he made to the police just after the collision should have been suppressed because he had not been advised of his Fifth Amendment rights as required by *Miranda*[1]; that the trial court erred by admitting his driving records and criminal history records to prove the existence of the prior drunk driving convictions; that the jury failed to find all the facts necessary to support a true finding on the prior convictions allegation; that the court erred by taking judicial notice of the fact that judges only accept admissions of certain prior drunk driving convictions; and that the court gave the jury inconsistent instructions on the burden of proof required for the prior convictions allegation. Assuming arguendo his trial counsel may have forfeited issues on appeal by failing to object, Lee puts forth claims of ineffective assistance. Finally, he contends the cumulative impact of prejudice from multiple errors requires reversal.

For the reasons discussed below, we conclude these claims are without merit. We will affirm the judgment.[2]

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Procedural Background

The prosecution charged Lee with four counts: Count 1—murder (Pen. Code, § 187)[3]; count 2—gross vehicular manslaughter (§ 191.5, subd. (a)); count 3—driving

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[1] *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

[2] Lee also filed a petition for a writ of habeas corpus, which we ordered considered with this appeal. We dispose of the petition by separate order filed this day. (See Cal. Rules of Court, rule 8.387(b)(2)(B).)

[3] Subsequent undesignated statutory references are to the Penal Code.

under the influence of alcohol and causing injury (Veh. Code, § 23153, subd. (a)); and count 4—driving under the influence of alcohol with a blood alcohol level of 0.08 percent and causing injury (Veh. Code, § 23153, subd. (b)). As to counts 1, 3, and 4, the prosecution alleged Lee personally inflicted great bodily injury in the commission of the offenses. (§ 12022.7, subd. (a).) As to count 2, the prosecution alleged Lee had previously been convicted of violating Vehicle Code section 23152 as punishable under Vehicle Code section 23540. Finally, as to counts 3 and 4, the prosecution alleged Lee had a blood alcohol level of 0.15 percent or more. (Veh. Code, § 23578.)

The jury found Lee guilty on all counts and found all allegations true. The trial court imposed a total term of 15 years to life consecutive to four years four months in state prison. The term consisted of 15 years to life on count 1, consecutive to 16 months on count 3, with three additional years for the great bodily injury enhancement. The court stayed all remaining terms under section 654.

B. Facts of the Offenses

1. Overview

Around 6:00 p.m. on July 11, 2010, Lee was driving his pickup truck south on Highway 101 towards Gilroy. Several nearby motorists observed Lee driving erratically.

Jesus Diaz and his family had parked on the side of Highway 101 after their pickup truck experienced mechanical problems. Jesus's wife Margarita and their 11-year-old daughter were standing on the side of the highway away from the vehicle.[4] The couple's four-year-old son Jose was sitting inside the rear passenger compartment of the truck. After calling for help, Jesus approached the passenger's side of the truck to check on Jose.

As Jesus was standing at the side of the truck, Lee veered off the highway and drove his truck into the rear end of the Diaz's truck. Jesus was knocked into the air and

[4] To avoid confusion, we refer to the Diaz family members by their first names.

suffered a broken jaw and a broken arm, among other injuries. Jose died from massive head trauma.

2. Testimony of Other Motorists

Mansfield Garratt was driving south on Highway 85 at about 68 miles per hour when he saw Lee's pickup truck drive past him and weave back and forth in the road ahead. The truck took a sudden left turn at a sharp angle and approached a concrete divider at high speed. As the truck got within 15 or 20 feet of the divider, it swung to the right and debris flew into the air. The truck turned roughly 90 degrees to the right and crossed three lanes of traffic. Garratt called 911 to report the truck because he was concerned someone might get hurt. At trial, the prosecution played an audio recording of the call for the jury.

Karen Wolk was turning south onto Highway 101 when she saw Lee's truck exit Highway 85 and enter Highway 101. The truck appeared to be "a bit unstable" and bounced up and down while going in and out of the shoulder of the onramp. The truck came so close to the sound wall by the freeway that Wolk thought the truck might hit the wall. Once the truck got onto Highway 101, it crossed several lanes of traffic into the far left lane. Wolk lost sight of the truck as it accelerated away from her, but she then saw a cloud of dust or smoke around a bend in the road ahead. The traffic then stopped, and she saw the truck upside down on the embankment. Wolk's husband called 911.

Joseph Ashwood was driving south on Highway 101 at about 75 miles per hour in the far left lane next to the carpool lane. He saw a vehicle in his rearview mirror kicking up dust. He then saw Lee's pickup truck gain on him and start to pass him on the right. Ashwood also noticed another pickup truck parked on the shoulder. Lee's truck was heading towards it. Ashwood then saw Lee's truck collide with the parked truck and roll over. Ashwood could not tell whether Lee's truck slowed down before the collision, but he did not see any brake lights.

Brieseida Valdovinos was also driving south on Highway 101 when she witnessed the collision. Lee's truck was about 10 car lengths ahead of her, going about 65 to 70 miles per hour. Valdovinos did not see any blinker or brake lights on the truck before the collision, and it did not appear to slow down.

3. Testimony of Jesus and Margarita Diaz

Jesus was driving his Chevy S10 pickup south on Highway 101 towards Gilroy when he encountered mechanical trouble and pulled off to the right side of the freeway. His wife Margarita, his 11-year-old daughter, and his four-year-old son Jose were in the truck with him. Once they stopped, he and Margarita pushed the truck onto a wider part of the shoulder for their family's safety. Jesus then called his brother-in-law to come pick him up. His daughter got hot in the truck, so she and Margarita waited outside by the side of the road away from the truck. Jose was asleep in the rear seat inside the truck when Jesus approached it from the passenger's side to check on him. That was the last thing Jesus remembered.

Margarita saw Lee's truck coming towards their own truck. She screamed and held her daughter tight. Lee's truck never stopped. It collided with their truck, and Jesus flew into the air. Lee's truck went over the cab of their truck and flipped over. Jesus was lying on the ground away from the truck when Margarita went to check on him. His jaw was broken and his face was swollen. Margarita was too afraid to check on Jose.

4. Police Officers' Testimony

CHP Officer Angel Casas arrived at the scene of the collision and spoke with other officers who were already there. One of them told Officer Casas to contact Lee, who was exhibiting signs of alcohol intoxication. His body was swaying, and his eyes were red and watery. His speech was slower than normal, and he was giving off a strong odor of alcohol. Officer Casas administered a preliminary alcohol screening test, which showed a blood alcohol level of 0.175 percent.

CHP Officer Jason Yount arrived and found Lee sitting on the asphalt shoulder in front of his truck. Lee had a towel with blood on it wrapped around his left arm. His eyes were red and watery, and he had a strong odor of alcohol coming from his breath and body. Officer Yount asked Lee if he had been drinking, and Lee said he had drunk "some beers earlier in the day." Officer Yount asked Lee to remain by the truck while the officer went to check on the status of the child. There were no other police officers around Lee. When Officer Yount returned to talk to Lee again, Lee was gone. He was walking down the shoulder about a quarter mile away. Officer Yount flagged down San Jose Police Officer Darren Michalek and asked Officer Michalek to retrieve Lee. Officer Michalek walked Lee back to the scene of the collision and turned him over to the CHP.

Lee was later taken to the hospital, where Officer Yount spoke with him again. Lee said he had heard someone had been killed, whereupon Officer Yount told Lee that a four-year-old child had died. Lee started to cry and stated, "I am so fucked." After crying for about three minutes, Lee sat up in his bed and started ripping off the wires that had been placed on his chest. Officer Yount advised him that he needed to stay in the bed, and Lee responded, "[W]hy don't you just go ahead—why don't you go ahead and just fucking shoot me now. I have no future. I am a complete looser [*sic*]." At 7:46 p.m., Lee submitted to a blood test, which showed a blood alcohol level of 0.16 percent.

5. Prior Convictions and Related Evidence

The prosecution presented evidence that Lee had suffered two prior drunk driving convictions. However, the superior court files for the convictions and the related proceedings had been purged and no longer existed. The parties stipulated there were no such physical court files.

Records from the Department of Motor Vehicles (DMV) showed Lee was convicted in 1988 under Vehicle Code section 23152, subdivision (b), driving with a blood alcohol level of 0.08 percent and above. Lee received three years' probation and

was required to attend a first offender driving under the influence program. DMV records showed Lee suffered the second conviction in 1994, again resulting in three years' probation and the requirement that he complete a driving under the influence program. Lee's driver's license was suspended for one year.

To explain the preparation and maintenance of these records, the prosecution introduced the testimony of DMV Driver Safety Manager Febie Zafra-Paraiso. Zafra-Paraiso supervised DMV hearing officers and was personally familiar with the preparation of DMV records. She testified about the DMV records pertaining to Lee's convictions. She stated that the information on the records was transmitted to the DMV from the court as taken from the defendant's court dockets in those matters. In earlier years, the court would send a hard copy of a defendant's docket to the DMV, and a data entry person would enter the information into the DMV's computer system. Eventually, the system changed from hard copy transmittal and manual entry to electronic transmission.

Zafra-Paraiso testified about the meaning of various codes and entries on Lee's DMV records pertaining to the above convictions. The records included designated codes for the court from which information about the conviction was transmitted. The records showed that for the 1988 conviction the DMV entered the information into its data system on January 19, 1989. For the 1994 conviction, the information was entered on April 29, 1994, and later updated on April 30, 1997. The DMV records showed Lee was mailed a notice of suspension of his driver's license for a second drunk driving conviction in 1994 under Vehicle Code section 13352. The DMV subsequently reinstated Lee driver's license. Zafra-Paraiso stated that a person cannot get a driver's license reinstated without providing proof of completion of drunk driving educational classes.

The prosecution also presented information about Lee's prior convictions based on criminal history records from the Criminal Justice Information Control (CJIC) system.

Peter Vigna, Supervisor of the CJIC Division at Santa Clara County Superior Court, testified about the operations of the CJIC system. He had personally worked as a CJIC operator earlier in his career, taking information from courtroom minutes provided by court clerks and entering it into the data management system. He testified about the information contained on the CJIC records pertaining to Lee's prior drunk driving convictions. CJIC records showed Lee pleaded guilty to violating Vehicle Code section 23152, subdivision (b), in December 1988. Lee was ordered to attend an alcohol education program as part of his sentence in that matter. As to the 1994 conviction, CJIC records showed he admitted the prior conviction and formal probation was granted. In April 1994, he was convicted of violating Vehicle Code section 23152, subdivision (b), and he admitted a prior conviction. In 1997, the sentence was "re-visited" and the records indicated the court ordered Lee to attend multiple offender program meetings.

Mavy Rodriguez, another former CJIC supervisor, testified about the current version of the CJIC database, CJIC-II, as compared to the prior version, CJIC-I. In 1995, the county switched from the CJIC-I system to CJIC-II. Both versions stored the information taken from court minute orders. However, the latter version is capable of handling more record codes than the prior version could handle. When the county moved to the CJIC-II system, data from records in the CJIC-I database was converted into the new system. The data from Lee's prior convictions was transferred into the CJIC-II system when the conversion took place. As a result of the conversion, a glitch was introduced into the record for Lee's earlier conviction which caused an incorrect date to appear for a probation modification in his later conviction. As a result, a weekend jail sentence was identified with the wrong year. However, the conversion glitches would not cause errors in data on prior convictions admitted or guilty pleas entered.

The prosecution also introduced testimony from probation officer Paul Abbott, whose report stated he had interviewed Lee in 1997. According to Abbott's report, Lee

had acknowledged pleading guilty to drunk driving in 1994, and he stated he had completed one year of the first offender alcohol program.

6. Defense Case

Robert Lindskog, an engineer specializing in accident analysis and reconstruction, testified for the defense. He testified that toolboxes in the rear of the Diaz's truck were improperly mounted to the sides of the truck, which caused one of the boxes to enter the cab of the truck and strike Jose on the head when Lee rear-ended the truck. He further observed that Jose, who was seated in the rear of the cab, was not properly secured in a child safety seat. The trial court took judicial notice that the law required a child safety seat unless the child was six years of age or older, or the child weighed 60 pounds or more. Because Jose weighed less than 60 pounds, Lindskog opined that Jose should have been secured in a child safety seat. Lindskog concluded that if the toolboxes had been properly mounted and Jose had been secured in a child safety seat, he would not have died. He admitted, however, that the tool box would not have entered the rear of the cab if Lee had not collided with the truck.

Dr. Jerry Callaway, a physician specializing in addiction medicine, testified about the effects of alcohol on the brain. He testified that when an individual has a blood alcohol level in the range of 0.15 to 0.20 percent, the person operates from the "animal brain" or "reptile brain" and exhibits no rational thought process or decision-making. He stated that when such an individual decides whether to get into a vehicle and drive, the person is not considering the consequences or risks of that decision.

II. DISCUSSION

A. Substantial Evidence of Murder and Gross Vehicular Manslaughter

Lee contends the evidence was insufficient to support his convictions for second degree murder and gross vehicular manslaughter. As to the murder conviction, he asserts there was no substantial evidence that he acted with conscious disregard for life. As to gross vehicular manslaughter, he contends there was no substantial evidence he acted

with awareness of the consequences of his actions when he began becoming intoxicated or when he started driving. The Attorney General contends substantial evidence supported both counts. For the reasons below, we conclude the record holds sufficient evidence to support both convictions.

1. Legal Principles

Murder is the unlawful killing of a human being or fetus with malice aforethought. (*People v. Taylor* (2004) 32 Cal.4th 863, 867.) Malice may be either express or implied. (*Ibid.*) It is implied when the killing results from an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life. (*Ibid.*) Implied malice has both a physical and a mental component—the physical component being the performance of an act, the natural consequences of which are dangerous to life, and the mental component being the requirement that the defendant knows that his conduct endangers the life of another and acts with a conscious disregard for life. (*Id.* at p. 868.)

" 'One who wilfully consumes alcoholic beverages to the point of intoxication, knowing that he thereafter must operate a motor vehicle, thereby combining sharply impaired physical and mental faculties with a vehicle capable of great force and speed, reasonably may be held to exhibit a conscious disregard of the safety of others.' " (*People v. Watson* (1981) 30 Cal.3d 290, 300-301 (*Watson*), quoting *Taylor v. Superior Court* (1979) 24 Cal.3d 890, 897.) Numerous courts have upheld murder convictions resulting from drunk-driving deaths. (See *People v. Talamantes* (1992) 11 Cal.App.4th 968, 973, collecting cases.) "The cases have relied upon some or all of the following factors in upholding drunk-driving-murder convictions: (1) a blood-alcohol level above the .08 percent legal limit; (2) a predrinking intent to drive; (3) knowledge of the hazards of driving while intoxicated; and (4) highly dangerous driving." (*Ibid.*)

"Gross vehicular manslaughter while intoxicated is the unlawful killing of a human being without malice aforethought, in the driving of a vehicle, where the driving was in violation of Section 23140, 23152, or 23153 of the Vehicle Code, and the killing was either the proximate result of the commission of an unlawful act, not amounting to a felony, and with gross negligence, or the proximate result of the commission of a lawful act that might produce death, in an unlawful manner, and with gross negligence." (§ 191.5, subd. (a).) "The requisite culpability . . . has been defined as the exercise of so slight a degree of care as to raise a presumption of conscious indifference to the consequences." (*Watson, supra*, 30 Cal.3d at p. 296.) "A finding of gross negligence is made by applying an objective test: if a *reasonable person* in defendant's position would have been aware of the risk involved, then defendant is presumed to have had such an awareness. [Citation.] However, a finding of implied malice depends upon a determination that the defendant *actually appreciated* the risk involved, i.e., a *subjective* standard." (*Id.* at pp. 296-297.)

"In reviewing the sufficiency of evidence under the due process clause of the Fourteenth Amendment to the United States Constitution, the question . . . is 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (*People v. Rowland* (1992) 4 Cal.4th 238, 269, quoting *Jackson v. Virginia* (1979) 443 U.S. 307, 319.) The California Constitution requires the same standard. (*Ibid.*) This standard applies even when the prosecution relies primarily on circumstantial evidence. (*People v. Maury* (2003) 30 Cal.4th 342, 396.) "[W]e review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] A reviewing court must reverse a conviction where the record provides no discernible support for the verdict even when viewed in the light most

favorable to the judgment below. [Citation.] Nonetheless, it is the [trier of fact], not the reviewing court, that must weigh the evidence, resolve conflicting inferences, and determine whether the prosecution established guilt beyond a reasonable doubt. [Citation.] And if the circumstances reasonably justify the trier of fact's findings, the reviewing court's view that the circumstances might also reasonably be reconciled with a contrary finding does not warrant reversal of the judgment. [Citation.]" (*People v. Hubbard* (2016) 63 Cal.4th 378, 392.)

2. Substantial Evidence Supported the Convictions for Second Degree Murder and Gross Vehicular Manslaughter

Lee contends the evidence was insufficient to show he acted with conscious disregard for life. He asserts there was no evidence of when or under what circumstances he consumed alcohol, nor of the circumstances under which he began driving. He argues that the prosecution's only evidence of conscious disregard focused entirely on his state of mind after he had already become intoxicated, at which point he was incapable of appreciating the consequences of his actions.

We are not persuaded. As to the circumstances under which he consumed alcohol, Lee admitted to Officer Yount that he had started drinking beers earlier in the day. The preliminary alcohol screening test taken shortly after the incident showed a blood alcohol level of 0.175 percent. The prosecution's expert on the effects of alcohol testified that a person of Lee's size or weight would have consumed about seven to eight drinks at that point. From this evidence, the jury could reasonably infer Lee had started drinking at a substantially earlier time, affording him opportunity for reflection or consideration of the risks of his conduct. Furthermore, the prosecution introduced evidence from which the jury could reasonably infer Lee could appreciate the risks and consequences of his actions prior to the collision. A witness reported seeing him driving erratically before he entered Highway 101, and he exhibited corrective maneuvers to avoid hitting concrete

barriers or veering entirely off the highway, suggesting he understood the dangers of causing a collision.

Moreover, the evidence showed Lee had suffered two prior convictions for drunk driving, and he had attended alcohol education programs on the effects of alcohol and the dangers of driving while intoxicated. The jury could reasonably infer Lee had learned years earlier about the risks inherent in drinking and driving. (See *People v. Brogna* (1988) 202 Cal.App.3d 700, 707 [both prior convictions and defendant's participation in various drinking driver programs were relevant to prove the knowledge element of implied malice]; see also *People v. Johnson* (1994) 30 Cal.App.4th 286, 291 [prior conviction alone was probative to establish defendant subjectively appreciated risks of driving drunk]; *People v. McCarnes* (1986) 179 Cal.App.3d 525 [evidence of extreme intoxication coupled with prior convictions and acts of reckless driving constituted substantial evidence of implied malice].)

Based on the same evidence, the jury could reasonably find gross negligence. Although the standard for gross negligence is objective, *Watson*, *supra*, 30 Cal.3d at pages 296-297, the jury could infer that a reasonable person in Lee's position would have been aware of the risk involved. (See *People v. Ochoa* (1993) 6 Cal.4th 1199, 1205 [evidence of defendant's actual subjective state of mind was relevant to show whether a reasonable person in defendant's position would be aware of the risks of drinking and driving].) A person with two prior drunk driving convictions, who had undergone educational programs on the effects of alcohol and the dangers of driving drunk, would be aware of the risks of doing so.

For the reasons above, the jury could reasonably infer beyond a reasonable doubt that Lee exhibited a conscious disregard for life sufficient to support the murder conviction. For similar reasons, the jury could reasonably find he acted with gross negligence sufficient to support the vehicular manslaughter conviction. Accordingly, we conclude these claims are without merit.

B. Absence of Instruction on Unconsciousness

Lee contends the trial court erred by failing to instruct the jury sua sponte that unconsciousness is a defense to murder and gross vehicular manslaughter. Even assuming the trial court had no sua sponte duty to give the instruction, Lee contends his trial counsel provided ineffective assistance by failing to request it. The Attorney General contends no such instruction was required because there was no substantial evidence to justify it. For the reasons below, we conclude no instruction was required, and we find no ineffective assistance of counsel.

1. Legal Principles

"Unconsciousness, *when not voluntarily induced*, is a complete defense to a charged crime." (*People v. Rogers* (2006) 39 Cal.4th 826, 887 (*Rogers*), italics added.) "An unconscious act, as defined 'within the contemplation of the Penal Code is one committed by a person who because of somnambulism, a blow on the head, or similar cause is not conscious of acting and whose act therefore cannot be deemed volitional.' " (*People v. Ferguson* (2011) 194 Cal.App.4th 1070, 1083, quoting *People v. Sedeno* (1974) 10 Cal.3d 703, 717.) However, "[t]he circumstance that a defendant, when a fatal traffic collision occurs, is unconscious as a result of voluntary intoxication, does not preclude a finding that the defendant harbored malice, because malice may have been formed prior to that time." (*People v. Whitfield* (1994) 7 Cal.4th 437, 454.) "A trial court must instruct on unconsciousness on its own motion if it appears the defendant is relying on the defense, or if there is substantial evidence supporting the defense and the defense is not inconsistent with the defendant's theory of the case." (*Rogers, supra,* 30 Cal.4th at p. 887.)

"[S]ubstantial evidence means evidence which is sufficient to deserve consideration by the jury and from which a jury composed of reasonable persons could conclude the particular facts underlying the instruction existed. The trial court is not required to present theories the jury could not reasonably find to exist." (*People v.*

Oropeza (2007) 151 Cal.App.4th 73, 78.) An asserted error in jury instructions is a question of law subject to review de novo. (*People v. Guiuan* (1998) 18 Cal.4th 558, 569.)

2. The Trial Court Was Not Required to Instruct on Unconsciousness

Lee contends there was evidence that he was unconscious at the time of the collision because he had fallen asleep or blacked out. He points out that witnesses saw no brake lights or turn signals illuminate on his vehicle just before the collision, and there was no evidence he made an effort to swerve or avoid the collision. But nearby motorists saw Lee driving in a manner that was inconsistent with unconsciousness. On Highway 85, shortly before the collision, he drove his pickup truck weaving back and forth, took a sudden left turn at a sharp angle, and managed to narrowly avoid hitting a concrete divider. He then exited Highway 85 and entered Highway 101, maneuvering his truck across several lanes of traffic to the far left lane. His vehicle was accelerating at times just before the collision. This pattern of conduct is inconsistent with unconsciousness. Lee also demonstrated his consciousness immediately following the collision, when he climbed out of his truck. These facts provide no reasonable basis to infer Lee was unconscious before or at the point of collision.

Lee points out that when police interviewed him at the hospital, he stated he did not remember what had happened after he changed lanes before the collision, and that he regained consciousness as he was getting out of his overturned vehicle. But a "defendant's own testimony that he could not remember portions of the events, standing alone, [is] insufficient to warrant an unconsciousness instruction." (*Rogers, supra,* 39 Cal.4th at p. 888.)

Lee cites testimony by a police officer who saw a paramedic examining Lee at the scene of the collision. Based on his training and experience, the officer opined that Lee was under the influence of alcohol because, among other things, Lee's eyes were bloodshot, watery, glossy, "and his eyelids were closing just like someone that was

falling asleep." Lee contends this supports the theory that he had fallen asleep at the time of the collision. We do not agree. First, Lee was conscious when he climbed out of his truck immediately after the collision. The state of his consciousness at some subsequent point suggests little about his state at the time of the collision. Second, the officer did not testify that Lee was falling asleep; the officer testified that Lee's eyes were closing "like someone that was falling asleep" because Lee was intoxicated. As Lee acknowledges, unconsciousness caused by voluntary intoxication cannot negate a finding of implied malice and is therefore not a defense to the murder charge. (*People v. Carlson* (2011) 200 Cal.App.4th 695, 705-707.) Finally, Lee's conduct immediately after the collision—by walking away from the scene and apparently attempting to evade arrest—showed consciousness of guilt. This implies he had been conscious of his conduct during the course of the collision.

Lee relies on three civil negligence cases to support his assertion that the act of driving off the side of the road without braking would support the inference that he had fallen asleep at the time of the collision. (See, e.g., *Cooper v. Kellog* (1935) 2 Cal.2d 504. 508 [reasonable to infer driver was asleep where car was on the wrong side of the highway in full view of the approaching car, and driver made no attempt to stop or return to his side of the road].) None of the cited cases involved intoxicated drivers who were driving erratically just before the accident. To the contrary, in two of the cases, alcohol had been ruled out as a factor. (*Traxler v. Thompson* (1970) 4 Cal.App.3d 278, 285; *Joslyn v. Callison* (1970) 12 Cal.App.3d 788, 792.) Those cases are inapposite here, where Lee's erratic driving just before the collision was entirely inconsistent with unconsciousness, and consistent with alcohol intoxication.

We conclude the evidence was insufficient to justify an instruction on unconsciousness, such that the trial court had no sua sponte duty to provide one. Furthermore, even if Lee's trial counsel had requested it, the court properly would have refused to give one. Accordingly, counsel did not provide ineffective assistance by

failing to request an instruction on unconsciousness. (See *People v. Anderson* (2001) 25 Cal.4th 543, 587 [defense counsel does not provide ineffective assistance of counsel by declining to lodge a futile objection].)

C. Refusal to Instruct on Partial Defenses Based on Voluntary Intoxication

The trial court denied Lee's request to instruct the jury with CALCRIM No. 625 (effect of voluntary intoxication on homicide crimes) and CALCRIM No. 626 (voluntary intoxication causing unconsciousness). Lee now contends the trial court erred in denying these instructions because substantial evidence showed he was unconscious when he collided with the Diaz's truck. The Attorney General contends neither instruction was justified. For the reasons below, we conclude the trial court did not err in denying Lee's requests.

1. Legal Principles

"Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought." (§ 29.4, subd. (b).) Based on section 29.4, CALCRIM No. 625 provides: "You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill[,] [or] [the defendant acted with deliberation and premeditation[,]] [[or] the defendant was unconscious when (he/she) acted[,]] [or the defendant <insert other specific intent required in a homicide charge or other charged offense>.] [¶] A person is *voluntarily intoxicated* if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect. [¶] You may not consider evidence of voluntary intoxication for any other purpose."

CALCRIM No. 626 provides: "Voluntary intoxication may cause a person to be unconscious of his or her actions. A very intoxicated person may still be capable of

physical movement but may not be aware of his or her actions or the nature of those actions. [¶] A person is voluntarily intoxicated if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect. [¶] When a person voluntarily causes his or her own intoxication to the point of unconsciousness, the person assumes the risk that while unconscious he or she will commit acts inherently dangerous to human life. If someone dies as a result of the actions of a person who was unconscious due to voluntary intoxication, then the killing is involuntary manslaughter. [¶] Involuntary manslaughter has been proved if you find beyond a reasonable doubt that: [¶] 1. The defendant killed without legal justification or excuse; [¶] 2. The defendant did not act with the intent to kill; [¶] 3. The defendant did not act with a conscious disregard for human life; AND [¶] 4. As a result of voluntary intoxication, the defendant was not conscious of (his/her) actions or the nature of those actions. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant was not unconscious. If the People have not met this burden, you must find the defendant not guilty of (murder/ [or] voluntary manslaughter)."

A trial court must grant a defendant's request for a legally correct and relevant pinpoint instruction when there is sufficient evidence to support the theory. (*People v. Saille* (1991) 54 Cal.3d 1103, 1120.) "[I]f a party asks the court to charge the jury on the law (rather than on matters of fact), and the charge is correct and pertinent, the court must give the instruction." (*People v. Eid* (2010) 187 Cal.App.4th 859, 879.) We review claims of instructional error de novo. (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1111 (*Martin*)).

2. The Trial Court Properly Refused to Instruct the Jury on Partial Defenses of Voluntary Intoxication

Lee's contention hinges on the assertion that he was unconscious at the time of the collision. But for the reasons set forth above, the evidence was insufficient to support

such a finding. The testimony concerning his driving just prior to the collision—that he was weaving back and forth, swerved to avoid a barrier, and accelerated during this period—was entirely inconsistent with unconsciousness. The same is true of his conduct following the collision. No juror could reasonably infer unconsciousness based on these facts.

Furthermore, as to the murder charge, voluntary intoxication does not negate implied malice. "[T]he 1995 amendments to [section 29.4] preclude a defendant from relying on his or her unconsciousness caused by voluntary intoxication as a defense to a charge of implied malice murder." (*People v. Carlson* (2011) 200 Cal.App.4th 695, 705; *Martin, supra,* 78 Cal.App.4th at p. 1114.)

For the reasons above, we conclude the trial court properly refused to instruct the jury on CALCRIM Nos. 625 and 626.

D. Admission of Defendant's Statements Made to the Police After the Collision

When police questioned Lee at the scene of the collision, he admitted he had been drinking earlier in the day. The trial court denied Lee's pretrial *Miranda* motion to suppress this statement. Lee contends this was error because he was in custody at the time, and the police had not yet *Mirandized* him. The Attorney General contends no advisement was required because Lee was not in custody at the time. For the reasons below, we conclude Lee was not in custody when he make the challenged statement.

1. Background

Lee moved pretrial to suppress various statements he made to the police following the collision. At issue here is Lee's admission to Officer Yount that he had drunk "some beers earlier in the day." Officer Yount had arrived at the scene of the collision and found Lee sitting on the asphalt shoulder in front of his overturned truck. Lee was neither handcuffed nor physically restrained in any fashion. Lee had a towel with blood on it wrapped around his left arm. After Lee made his admission, Officer Yount asked him to remain by the truck while the officer went to check on the status of the child.

There were no other police officers around Lee. At some point after Officer Yount left him alone, Lee started walking away from the scene of the collision. Lee had not been *Mirandized* when he made his admission.

After a hearing under Evidence Code section 402, the trial court denied Lee's motion to suppress the above admission. The court found "Lee was not in a custodial situation when he first spoke with Officer Yount, so any statements that he made to Officer Yount regarding driving and/or alcohol would be allowed in. He was not *Mirandized*, but I do not find that to have been necessary at that point." However, the trial court suppressed subsequent statements Lee made after he was taken into custody.

2. Legal Principles

The Fifth Amendment's self-incrimination clause provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." (U.S. Const., 5th Amend.) "To safeguard a suspect's Fifth Amendment privilege against self-incrimination from the 'inherently compelling pressures' of custodial interrogation [citation], the high court adopted a set of prophylactic measures requiring law enforcement officers to advise an accused of his right to remain silent and to have counsel present prior to any custodial interrogation. [Citation.]" (*People v. Jackson* (2016) 1 Cal.5th 269, 338-339 (*Jackson*).) " '[T]he prosecution bears the burden of establishing by a preponderance of the evidence that [a *Miranda*] waiver was knowing, intelligent, and voluntary under the totality of the circumstances of the interrogation.' [Citation.]" (*Id.* at p. 339.)

"A statement obtained in violation of a suspect's *Miranda* rights may not be admitted to establish guilt in a criminal case. [Citation.]" (*Jackson*, *supra*, 1 Cal.5th at p. 339.) "But in order to invoke [*Miranda*'s] protections, a suspect must be subjected to *custodial interrogation*, i.e., he must be 'taken into custody or otherwise deprived of his freedom in any significant way.' [Citation.] 'The ultimate inquiry is whether there is "a formal arrest or restraint on freedom of movement" of the degree associated with a

formal arrest.' [Citation.]" (*People v. Morris* (1991) 53 Cal.3d 152, 197, disapproved on other grounds by *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.) Based on the circumstances of the interrogation, we ask whether " 'a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave.' " (*People v. Ochoa* (1998) 19 Cal.4th 353, 401-402.) The factors relevant to this analysis include "whether contact with law enforcement was initiated by the police or the person interrogated, and if by the police, whether the person voluntarily agreed to an interview; whether the express purpose of the interview was to question the person as a witness or a suspect; where the interview took place; whether police informed the person that he or she was under arrest or in custody; whether they informed the person that he or she was free to terminate the interview and leave at any time and/or whether the person's conduct indicated an awareness of such freedom; whether there were restrictions on the person's freedom of movement during the interview; how long the interrogation lasted; how many police officers participated; whether they dominated and controlled the course of the interrogation; whether they manifested a belief that the person was culpable and they had evidence to prove it; whether the police were aggressive, confrontational, and/or accusatory; whether the police used interrogation techniques to pressure the suspect; and whether the person was arrested at the end of the interrogation." (*People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1162.) The prosecution bears the burden of showing the defendant was not in custody. (*People v. Davis* (1967) 66 Cal.2d 175, 180-181; *People v. Ceccone* (1968) 260 Cal.App.2d 886, 893.)

"In reviewing the trial court's denial of a suppression motion on *Miranda* and involuntariness grounds, ' " 'we accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if supported by substantial evidence. We independently determine from the undisputed facts and the facts properly found by the trial court whether the challenged statement was illegally obtained.' " ' [Citations.]" (*People v. Duff* (2014) 58 Cal.4th 527, 551.) "[I]ssues relating to the suppression of

statements made during a custodial interrogation must be reviewed under federal constitutional standards." (*People v. Nelson* (2012) 53 Cal.4th 367, 374.) If a trial court erroneously admits statements in violation of the federal Constitution, we must reverse the judgment unless the state proves the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error did not contribute to the verdict obtained]; *People v. Neal* (2003) 31 Cal.4th 63, 86.)

3. Lee Was Not in Custody When He Admitted Drinking

Lee points to several factors to support his claim that he was in custody at the time of the admission. He notes the fact that he was at the scene of a violent collision, with the presence of ambulances, a police helicopter, police cars, and other police vehicles. He contends "any reasonable person would believe such a collision with a vehicle parked on the side of the freeway is a strong indication of criminally reckless driving," and that Officer Yount's interaction with him would have caused any reasonable person to believe he or she was not free to leave. Lee relies on cases outside California for the proposition that these factors establish custody. (See *People v. Patel* (2000) 313 Ill.App.3d 601; *Jordy v. State of Texas* (Tex.App. 1998) 969 S.W.2d 528.) Those cases are not binding authority, and we do not find them persuasive in this matter.

The totality of the circumstances establish that Lee was not in custody at the time of his admission. He was not in a traditionally custodial setting such as a police station. He had not been at the scene for a long period of time when Officer Yount approached him. There is no evidence Officer Yount's demeanor was particularly imposing or aggressive. No law enforcement officer had yet told him to remain at the scene, and nobody had told him he was the suspect in a crime. Lee was not handcuffed, physically restrained, sitting in a police vehicle, or surrounded by police officers limiting his movement. The fact that Lee actually walked away from the site of the collision demonstrates that he was not actually restrained in any fashion.

In those circumstances, a reasonable person in Lee's situation would have felt at liberty to leave. Accordingly, we conclude the trial court did not err in finding Lee was not yet in custody, and the motion was properly denied as to the admission of drinking.

E. Substantial Evidence for the Enhancement Under Section 191.5, Subdivision (d)

Lee contends the evidence was insufficient to support a true finding on the prior qualifying convictions enhancement to count 2. He asserts the evidence for this allegation consisted of unreliable testimonial hearsay. The Attorney General contends the DMV and CJIC records provide substantial evidence to support the conviction. For the reasons below, we conclude substantial evidence supported the enhancement.

1. Background

Section 191.5, subdivision (d), provides for a term of 15 years to life for any person convicted under subdivision (a) who has one or more convictions for violating, among other provisions, Vehicle Code section 23540. The applicable version of Vehicle Code section 23540 circumscribed a violation of Vehicle Code section 23152 within seven years of a separate violation of that section, among others. (Former Veh. Code § 23165, Stats. 1986, ch. 1117, § 2.)

As to count 2 (gross vehicular manslaughter under section 191.5, subdivision (a)), the prosecution alleged Lee had previously been convicted of violating Vehicle Code section 23152, subdivision (b) (driving with a blood alcohol level of 0.08 percent or more), and that had admitted a qualifying prior conviction under section 191.5, subdivision (d).

The trial court instructed the jury as follows: "If you find the defendant guilty of the crime charged in Count two, you must then decide whether the People have proved the additional allegation that the defendant was previously convicted of a violation of Vehicle Code Section 23152 with a prior pursuant to Penal Code section 191.5 subsection (d). This issue must be decided separately from the issue of whether the prior alleged violations of Vehicle Code Section 23152 have been proved—proven for the purposes set

forth in instruction number 375[5] as the burden of proof is different. [¶] Under instruction number 375, the burden of proof is preponderance of the evidence. Under this instruction, the burden of proof is beyond a reasonable doubt. [¶] . . . [¶] The People allege that the defendant has been convicted of a violation of Vehicle Code Section 23152(b), subsection (b), on April 5, 1994, in Santa Clara County court, in case number C9478539, and that he admitted a qualifying prior. [¶] You may consider this evidence in deciding whether the defendant was previously convicted of driving under the influence with a prior conviction for purposes of the allegation under Count two. You may not consider it for any other purpose except as set forth in instruction number 375. [¶] To prove this allegation, the People must prove that, one, the defendant was convicted of a violation of Vehicle Code Section 23152 subsection (b) on April 5, 1994, in Santa Clara County, case number C9478539; and two, the defendant admitted a qualifying prior conviction in that same proceeding on April 5, 1994. [¶] You must decide whether the defendant admitted a prior conviction in relation to Santa Clara County case number C9478539. [¶] The People have the burden of proving the truth of the alleged conviction beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved and that the allegation is not true."

To prove the elements of the enhancement, the prosecution presented DMV and CJIC records showing Lee had been convicted of two drunk driving offenses in 1988 and 1994, as well as his probation officer's testimony that Lee had admitted a prior conviction. The jury found the allegation true. The trial court imposed a term of 15 years to life based on this finding, but the court stayed the term under section 654.

[5] Instruction number 375 was based on CALCIM No. 375.

2. Substantial Evidence Supported the Enhancement[6]

Lee contends the evidence used to prove the enhancement—DMV and CJIC records of his prior 1988 and 1994 convictions—constituted unreliable and unsubstantiated testimonial hearsay. He argues that "unsubstantiated hearsay" does not constitute sufficient evidence. He further contends that substantial evidence of a prior conviction must be limited to the record of the court of the prior conviction, and he asserts the DMV and CJIC documents are not part of those records. He acknowledges that computerized records complying with Evidence Code section 1280 are admissible to prove the fact of a conviction. (See *People v. Martinez* (2000) 22 Cal.4th 106, 134 (*Martinez*).) He contends, however, that the nature and circumstances of the conduct underlying the conviction cannot be proven by documents outside the record of conviction. (See *People v. Thoma* (2007) 150 Cal.App.4th 1096, 1102.)

The prosecution presented DMV records and CJIC criminal history records to prove Lee had suffered a 1988 conviction under Vehicle Code section 23152 and a subsequent drunk driving conviction less than seven years later in 1994. As set forth above in section I.B.5, the prosecution introduced the testimony of DMV driver safety manager Febie Zafra-Paraiso and CJIC Supervisor Peter Vigna to explain how these documents were maintained and created. The Attorney General contends this evidence was sufficient to establish the required elements of section 191.5, subdivision (d), and Vehicle Code section 23450.

We agree with the Attorney General. The CJIC records showed Lee pleaded guilty to violating Vehicle Code section 23152 on December 19, 1988. Although the records listed the date of arrest as August 20, 1999, Vigna testified that the erroneous date would have been the CJIC operator's responsibility. DMV records showed the date of citation and arrest to be August 20, 1988. CJIC records further showed Lee was

[6] The legal standard for substantial evidence is set forth above in section II.A.1.

arrested and booked for drunk driving on January 8, 1994, in case No. C9478539, and that he was convicted of violating Vehicle Code section 23152 on April 5, 1994. Additional CJIC records showed Lee admitted to a prior conviction on that date, whereupon the trial court granted formal probation and referred Lee to an alcohol education program. DMV records also showed that Lee had suffered a prior conviction and was ordered to attend a multiple offender education program. These records, together with the supporting testimony, established sufficient evidence to prove the elements of the enhancement as set forth above.

Lee contends that the CJIC records are insufficient to show the dates of the violations because they only show the date of arrest. But given the nature of a drunk driving offense, the jury could reasonably infer that Lee was arrested at the time of the violations. Lee contends the date of arrest is not a part of the record of conviction and is therefore inadmissible, but he provides no authority to support this proposition.[7] And as Lee acknowledges, the DMV records report the dates of arrest. We conclude that sufficient evidence supports the findings on the enhancement under the exception for records set forth in *Martinez, supra*, 22 Cal.4th 106.

As to the reliability of the evidence, we are not persuaded by Lee's contention that the documents were unsubstantiated and unreliable. The CJIC and DMV records largely corroborated each other, and certain facts were further corroborated by the testimony of Lee's probation officer. We recognize the potential danger for a less reliable showing in the event a conviction would be based on less complete versions of such historical documents—for instance, if the prosecution had simply presented CJIC records and nothing more. We do not intend to endorse such practices. But here, where the

[7] As part of this claim, Lee cites in passing to *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*) for the proposition that the information constitutes unreliable and inadmissible testimonial hearsay. For the reasons set forth below in section II.F, we reject this claim.

prosecution presented abundant evidence with corroborating details and supporting testimony, we conclude the evidence was sufficiently reliable to support the jury's findings.

F. Admissibility of DMV and CJIC Records and Related Evidence to Prove Prior Convictions

Lee contends the trial court erred by admitting the DMV and CJIC records pertaining to his prior drunk driving convictions. He asserts several arguments as part of this claim. First, he claims that neither the CJIC records nor the DMV documents qualified as official records under the hearsay exception set forth in Evidence Code section 1280. Second, he claims evidence of his attendance at alcohol education classes was admitted without foundation. Third, he contends evidence of the dates of the drunk driving violations constituted testimonial hearsay admitted in violation of the Confrontation Clause of the Sixth Amendment under *Crawford* and its progeny. The Attorney General contends the CJIC and DMV records were properly admitted under the rules of evidence, and he contends the evidence of the dates of the violations did not constitute testimonial hearsay under *Crawford*.

1. Background

The prosecution introduced certified CJIC and DMV records through the testimony of DMV Driver Safety Manager Zafra-Paraiso and CJIC Supervisor Vigna as set forth above in section I.B.5. The prosecution had moved in limine to admit this evidence under Evidence Code section 1101, subdivision (b). Lee objected to the evidence as untrustworthy and inadmissible as hearsay under *Martinez, supra,* 22 Cal.4th 106 (admission of computer-generated printout of defendant's criminal history information to prove prior felony convictions was not an abuse of discretion). Lee lodged further objections based on the Confrontation Clause of the Sixth Amendment. The prosecution argued that the evidence satisfied the foundational requirements of

Evidence Code section 1280. The trial court found the CJIC and DMV records were trustworthy and admissible under Evidence Code section 1280.

2. Legal Principles

Under Evidence Code section 1280, "Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition, or event if all of the following applies: [¶] (a) The writing was made by and within the scope of duty of a public employee. [¶] (b) The writing was made at or near the time of the act, condition, or event. [¶] (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

"Whether the trustworthiness requirement has been met is a matter within the trial court's discretion." (*People v. Parker* (1992) 8 Cal.App.4th 110, 116.) Evidence Code section 1280 " 'permits the court to admit an official record or report without necessarily requiring a witness to testify as to its identity and mode of preparation if the court takes judicial notice or if sufficient independent evidence shows that the record or report was prepared in such a manner as to assure its trustworthiness.' [Citation.] 'In addition to taking judicial notice, a court may rely on the rebuttable presumption that official duty has been regularly performed (Evid. Code, § 664) as a basis for finding that the foundational requirements of Evidence Code section 1280 are met.' [Citation.]" (*People v. George* (1994) 30 Cal.App.4th 262, 274.)

The California Supreme Court has held that properly authenticated documents from a computerized criminal history database are admissible under Evidence Code section 1280. (*Martinez*, *supra*, 22 Cal.4th at pp. 134-136.) Furthermore, "Evidence Code section 452.5, subdivision (b) creates a hearsay exception allowing admission of qualifying court records to prove not only the fact of conviction, but also that the offense reflected in the record occurred." (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1460.) We apply the abuse of discretion standard of review to a trial court's decision to admit

evidence. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1144, disapproved on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390.)

"The Confrontation Clause of the Sixth Amendment provides that '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.' (U.S. Const., 6th Amend.) The Confrontation Clause thereby bars 'admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.' [Citation.] This bar applies only to testimonial statements; admission of nontestimonial statements, while subject to state law hearsay rules, does not violate the Confrontation Clause. [Citation.]" (*People v. Pettie* (2017) 16 Cal.App.5th 23, 62-63.) We review de novo whether a statement is testimonial and therefore implicates the Confrontation Clause. (*People v. Nelson* (2010) 190 Cal.App.4th 1453, 1466.) "We evaluate the primary purpose for which the statement was given and taken under an objective standard, 'considering all the circumstances that might reasonably bear on the intent of the participants in the conversation.' " (*Ibid.*)

3. Admission of DMV and CJIC Records Was Not an Abuse of Discretion

CJIC Supervisor Vigna testified about the operations of the CJIC system and the CJIC records introduced to show Lee's prior convictions. Based on his past personal experience as a CJIC operator, he testified that the records were prepared by other CJIC operators, who were public employees required to undergo a six-month training course to accurately enter case information into the data system. Dispositions from court proceedings were transmitted to the CJIC operators within 24 hours and inputted into the CJIC data system within 24 hours. Vigna testified that the information entered by the operators came from court minute orders of the proceedings. Vigna's testimony thereby established that the CJIC records were made by and within the scope of duty of public employees at or near the time of the relevant events, and that the sources of information

and method and time of preparation indicated trustworthiness as required under Evidence Code section 1280.

Lee points to Vigna's testimony that "hundreds" of errors could be present in the CJIC records, but Vigna's estimate was based on 19 years of experience, not a single set of records relating to any one proceeding. The trial court did not abuse its discretion by admitting these records. Lee points to an error in data caused by the conversion of CJIC data during the change from the CJIC-I system to the CJIC-II system, but the testimony of former CJIC Supervisor Mavy Rodriguez established that any errors in the conversion were immaterial. The evidence showed that CJIC records were not perfect, but the presence of errors was not so ubiquitous that it undercut the overall reliability of the CJIC records of Lee's prior convictions. We note that much of the relevant data in the CJIC records was further corroborated by the DMV records.

As to the DMV records, DMV Driver Safety Manager Zafra-Paraiso provided similar testimony. Information on the DMV documents was obtained from docket records received directly from the court, either in hard copy form or through direct electronic transmission from the court. DMV data entry employees would take data from hard copies and enter it into the DMV data system until the system changed to allow for direct transmission of the same information. The DMV records also showed the date of entry. With respect to both the 1988 and 1994 conviction, the data was entered within one month. This testimony established the necessary foundation under Evidence Code section 1280. The trial court therefore did not abuse its discretion by admitting this data. Lee contends this information was not part of the record of conviction, but the evidence was admitted as proof of implied malice, not simply to prove the prior convictions. Lee cites no authority for the proposition that this evidence would be inadmissible for the purposes of showing implied malice.

4. Evidence of Attendance at Alcohol Education Program

Lee contends the trial court erred by admitting testimony from his probation officer concerning Lee's completion of a first-offender alcohol education program after his 1994 drunk driving conviction. Lee argues that this testimony should not have been admitted because the witness testified based on the DMV and CJIC records, and those records should not have been admitted either. But we find no error in admission of the DMV and CJIC records, so the probation officer's testimony about them was not erroneously admitted either.

Lee also contends the probation officer's testimony about attendance at an alcohol education program concerned matters outside the record of conviction and was therefore inadmissible to prove he had prior convictions. But the relevance of this testimony pertained to the element of malice—i.e., Lee's prior knowledge of the risks and consequences of driving while intoxicated—not simply the existence of prior convictions. We find no error in the admission of this testimony.

5. Evidence of the Dates of Arrest Did Not Constitute Testimonial Hearsay

Lee contends the evidence of the dates of arrest constituted testimonial hearsay under the Confrontation Clause of the Sixth Amendment, such that the trial court erred by admitting it under *Crawford* because the declarants were not subject to cross-examination.[8] Lee reasons that the testimony at issue must have originated with police officers who were not made available for cross-examination.

Hearsay under *Crawford* and its progeny is only " 'testimonial' " under the Sixth Amendment if the statement was "made with some degree of formality or solemnity" and "its primary purpose pertains in some fashion to a criminal prosecution." (*People v.*

[8] Lee contends that if we found his trial counsel failed to object to this evidence under *Crawford*, trial counsel provided ineffective assistance. We conclude trial counsel adequately objected and the claim is not forfeited. Accordingly, trial counsel did not provide substandard representation.

Dungo (2012) 55 Cal.4th 608, 619.) Statements that "merely record objective facts" are less formal. (*Ibid.*) Furthermore, "official records consisting of computerized compilations of data from multiple agencies are simply not the type of hearsay that the Supreme Court envisioned when it spoke of 'testimonial hearsay' in the *Crawford* case. . . . [T]he *Crawford* opinion excepts business records from testimonial hearsay, saying that they 'by their nature [are] not testimonial.' " (*People v. Morris* (2008) 166 Cal.App.4th 363, 373, quoting *Crawford*, *supra*, 541 U.S. at p. 56.) We conclude the admission of the dates of arrest did not violate the Confrontation Clause because such information did not constitute testimonial hearsay under *Crawford* and its progeny.

G. Whether the Jury Found All Necessary Facts for the Prior Conviction Allegation Under Section 191.5, Subdivision (d)

Lee contends the jury did not find all the facts necessary to support a true finding on the prior qualifying conviction allegation under section 191.5, subdivision (d), in count 2. He argues that the trial court never instructed the jury it had to find he had a prior conviction, nor that the conviction was based on a violation that occurred within seven years of the subsequent violation. The Attorney General contends the jury was properly instructed and made the necessary findings. For the reasons below, we reject Lee's claim.

1. Legal Standards

Both the California Constitution and the federal constitution mandate that a criminal conviction requires proof of every element of the offense beyond a reasonable doubt. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278; *People v. Flood* (1998) 18 Cal.4th 470, 479-482.) The same standard applies to a jury's findings of all the facts necessary to find a sentencing enhancement true. (*Cunningham v. California* (2007) 549 U.S. 270, 293; *People v. Sengbodychith* (2001) 26 Cal.4th 316, 327.)

We review de novo the validity of jury instructions. (*People v. Alvarez* (1996) 14 Cal.4th 155, 217.)

2. The Jury Found All Facts Necessary to Support the Prior Convictions Enhancement

Lee contends the jury did not find all the facts necessary to support its true finding on the prior convictions enhancement because the trial court failed to instruct it on the necessary facts.[9] As set forth in detail above, the trial court instructed the jury it must find, among other things, that Lee was convicted of violating Vehicle Code section 23152, subdivision (b) in the 1995 proceeding, and that Lee "*admitted* a qualifying prior conviction" in that proceeding. (Italics added.)

Lee contends the trial court failed to instruct the jury on three facts necessary to this finding. First, he argues the court never instructed the jury to determine whether Lee had actually suffered a prior conviction, as distinct from finding that he *admitted* to a prior conviction. Lee asserts that proof of an admission of a prior conviction is not proof of a conviction, because the admission is an event that occurs after the conviction. For this proposition, he relies on *People v. Roberts* (2011) 195 Cal.App.4th 1106, 1126-1127 [only admissions made prior to the acceptance of a defendant's guilty plea may be relied upon in determining whether a prior conviction qualifies as a strike]. But that case concerned findings on the nature of a prior conviction—e.g., whether it constituted a serious felony—not simply the determination of whether the conviction itself actually occurred. Given a finding that a defendant has admitted the fact of a prior conviction, the trial court is empowered to find it qualifies for purposes of enhancing a sentence. (Cf. *People v. Wilson* (2013) 219 Cal.App.4th 500, 516 (*Wilson*) [a court may not impose a sentence above the statutory maximum based on disputed facts about prior conduct *not admitted by the defendant*]).

Second, Lee contends the trial court failed to instruct the jury that it must find whether the prior conviction was for a violation of Vehicle Code section 23152. He notes

[9] The statutory requirements for the allegation and the relevant jury instructions are set forth above in section II.E.1.

that the jury was instructed it must find a "qualifying conviction[]" but he accurately observes that the trial court never instructed the jury on what convictions would qualify. Third, Lee points out that the jury was never instructed that it must find the qualifying conviction arose from a violation that occurred within seven years of the violation underlying the 1994 conviction. The Attorney General contends that the trial court was empowered to make these findings. Lee disputes this and contends such a finding would require the court to examine facts outside the record of conviction in violation of his right to a jury trial.

We need not resolve this. Even assuming it was error not to submit those matters to the jury, the error was harmless. " 'Failure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error.' [Citation.] 'Such an error does not require reversal if the reviewing court determines it was harmless beyond a reasonable doubt, applying the test set forth in *Chapman v. California* (1967) 386 U.S. 18 . . . .' [Citation.] If we conclude, beyond a reasonable doubt, that a jury, applying the beyond-a-reasonable-doubt standard, unquestionably would have found true the strike prior allegation, then the error is harmless." (*Wilson*, *supra*, 219 Cal.App.4th at p. 519.) Based on the CJIC and DMV records and related testimony, we conclude beyond a reasonable doubt that the jury would have found the allegation true if it had been instructed as Lee contends it should have been instructed. Accordingly, we conclude this claim is without merit.

H. Judicial Notice of Whether Courts Accept Admissions of Prior Convictions That Qualify for Enhancement Under Section 191.5, Subdivision (d)

At trial, the court took judicial notice of "the fact that a judge does not accept an admission of a prior without a plea to an underlying charge to which the prior has relevance. [¶] In the case of a driving under the influence pursuant to Vehicle Code Section 23152 subdivision (a), driving with a blood alcohol level of .08 or more pursuant to Vehicle Code Section 23152 subdivision (b). [¶] The relevant priors would be either

violations of Vehicle Code Section 23152 subdivision (a), driving under the influence of alcohol, or Vehicle Code Section 23152 subdivision (b), driving with a blood alcohol level of .08 percent or more, or Vehicle Code Section 23153 subdivision (a), driving under the influence and causing injury, or Vehicle Code Section 23153 subdivision (b), driving with a blood alcohol level of 0.08 percent or more and causing injury, or Vehicle Code Section 23103 pursuant to Vehicle Code Section 23103.5, commonly known as a wet reckless."

Lee contends the trial court erred in taking judicial notice of these facts. He asserts that the topic was not a proper object of judicial notice; that it was irrelevant; and that it was substantially more prejudicial than probative because of the danger the jurors would rely on it as grounds for finding his prior conviction arose from a violation of Vehicle Code section 23152 within seven years of the subsequent violation as required for the prior convictions enhancement on count 2.

1. Legal Principles

Under Evidence Code section 451, judicial notice shall be taken of "[t]he decisional, constitutional, and public statutory law of this state," among other things. (Evid. Code, § 451, subd. (a).) Evidence Code section 452 further provides that judicial notice may be taken of "[f]acts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute." (Evid. Code, § 452, subd. (g).) We apply the abuse of discretion standard of review to a trial court's decision whether to take judicial notice. (*CREED-21 v. City of San Diego* (2015) 234 Cal.App.4th 488, 520.)

2. Judicial Notice Was Not an Abuse of Discretion

In granting the prosecution's request for judicial notice, the trial court observed that "the issue of judicial notice is whether the fact that is being taken, being judicially noticed, is something that is universally basically agreed upon and that you would see. And I think that everyone working in the criminal justice system would agree that a judge

doesn't take an admission of a prior just by itself. It has to accompany an underlying charge." Defense counsel objected and posited that a defendant could admit a prior conviction pretrial only to be acquitted of the charges at the conclusion of a trial.[10] But the prosecution accurately pointed out that this case did not involve such a situation because Lee had pleaded guilty in the relevant proceeding.

The trial court's taking of judicial notice in this instance was not an abuse of discretion. First, parts of the "facts" included in the judicial notice simply incorporated the law as set forth in the relevant statute—i.e., that only certain types of prior convictions would qualify as second offenses under Vehicle Code section 23540. Evidence Code section 451, subdivision (a) allows for such notice. Second, the fact that a court would not take an admission of a prior conviction unless there was an accompanying plea or charge is sufficiently indisputable that the trial court did not abuse its discretion in so finding. As to claims that the notice was irrelevant and prejudicial, we are not convinced. The danger that the jury would misuse the noticed facts did not substantially outweigh the probative value of the notice. We conclude this claim is without merit.

I. Jury Instructions Regarding the Burden of Proof Required for the Prior Convictions Sentencing Enhancement

Lee contends the trial court gave the jury inconsistent and contradictory instructions on the burden of proof required to find the prior convictions enhancement under section 191.5, subdivision (d), as alleged in count 2. We find nothing inconsistent nor contradictory in the trial court's instructions.

[10] Lee puts forth a claim of ineffective assistance of counsel in the event we find this claim forfeited. The Attorney General concedes, however, that defense counsel adequately objected. We accept the Attorney General's concession and agree that trial counsel lodged objections to the taking of judicial notice. Counsel therefore did not provide a substandard level of representation.

As to the element of malice in count 1, the trial court properly instructed the jury based on CALCRIM No. 375 that it could consider the prior convictions as evidence of malice only if the jury found by a preponderance of the evidence that Lee in fact committed the offenses. As to the prior convictions enhancement on count 2, the trial court properly instructed the jury that the prosecution had the burden of proving the allegation beyond a reasonable doubt.[11] Lee contends the trial court erred by instructing the jury to apply two different standards of proof to the same finding.

Lee's argument ignores the trial court's instructions to the contrary. When reviewing the adequacy of jury instructions, we must look to the instructions as a whole and we assume the jurors are intelligent persons capable of correlating all the instructions given. (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.) Here, in instructing the jury on the preponderance of evidence standard with respect to the issue of malice in count 1, the trial court expressly instructed the jury that "[t]he following instruction applies solely to the issue of malice aforethought in Count one." Similarly, as part of this instruction the trial court instructed the jury to use this finding "for the limited purpose of deciding whether or not the defendant knew[,] at the time he acted in the instant case[,] that his act was dangerous to human life." Then, in the course of instructing the jury on count 2 that proof of the enhancement must be found beyond a reasonable doubt, the court instructed the jury, "You may consider this evidence in deciding whether the defendant was previously convicted of driving under the influence with a prior conviction for purposes of the allegation under Count two. You may not consider it for any other purpose except as set forth in instruction number 375."

Thus, the jury was expressly told to consider evidence of the prior convictions for two different purposes, and to apply the respective burdens of proof separately as to each of the two findings. Nothing about these instructions was confusing, contradictory, or

[11] The relevant jury instructions are set forth above in section II.E.1.

inconsistent. Lee relies on *People v. Cruz* (2016) 2 Cal.App.5th 1178 (*Cruz*), for the proposition that the two instructions were contradictory. But the instructions in that case did not include the language above instructing the jury to apply the two different burdens of proof solely and separately in the respective contexts. Furthermore, the issue in *Cruz* involved the use of currently charged offenses to show propensity under Evidence Code section 1108, whereas here the findings involved prior convictions. The instructions in *Cruz* were therefore more likely to create confusion. We conclude the instructions here were neither confusing nor contradictory, and there is no reasonable likelihood the jury misapplied them.

J. Cumulative Prejudice

Finally, Lee contends the cumulative impact of prejudice from multiple errors requires reversal. Because we do not find multiple errors, there is not prejudice to consider cumulatively.

For the reasons above, we will affirm the judgment.

III. DISPOSITION

The judgment is affirmed.

_____
Greenwood, P.J.

WE CONCUR:

_____
Elia, J.

_____
Mihara, J.

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